No. 20,120

United States Court of Appeals

For the Ninth Circuit

LOUIS HORNER, JOHN L. CONNOLLY, VICTOR ROMERO, JAMES RIEMERS, and HUGH BELL for the benefit of THE PACIFIC COAST DISTRICT OF NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, an unincorporated association,

Appellants,

vs.

W. A. FERRON, HENRY A. BORELLO, W. H. BUTTRAM, ROBERT H. HORNE, C. W. JENKINS, HARRY LEWIS, R. H. ROBINSON, F. E. WALTON, C. BLACK, H. COLEMAN, S. R. FRANKS, GEORGE B. SALOVICH, FRODE ANDERSEN, FRANCIS H. ROGERS, CHEMICAL BANK NEW YORK TRUST COMPANY, a New York corporation, and FIRST DOE through TENTH DOE, inclusive,

Appellees.

Appeal from an Order Denying Application and Motion to File Complaint of the United States District Court for the Northern District of California, Southern Division

Honorable George B. Harris, Judge

APPELLANTS' REPLY BRIEF

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I. PRELIMINARY STATEMENT.

Nearly all of appellees' legal and factual arguments rest upon a single, critical contention: that this Court

should review the lower court's ruling as if that ruling were a judgment entered after a trial on the merits (Appellees' Brief, 8-11). Of course, the very crux of this appeal is that appellants have *not* been granted a trial on the merits of their claim; they have not even been allowed to file their complaint. The standard of appellate review to be applied in reviewing a decision entered under Section 501(b) is thus of vital importance. It is discussed first in order below.

II. ARGUMENT.

A. STANDARD OF REVIEW: EVIDENTIARY CONFLICTS SHOULD BE RESOLVED IN FAVOR OF APPELLANTS.

On appeal, an order refusing leave to file a complaint under Section 501(b) of the LMRDA should be reviewed by a standard which is *at least* as strict as that applied in reviewing an order granting summary judgment. As with the summary judgment procedure, Section 501(b) provides a method of eliminating those cases wherein no factual disputes or conflicting factual inferences are presented; and neither its legislative background nor the authorities which have interpreted it suggest that the "good cause" provision of Section 501(b) was intended to authorize the resolution of factual conflicts in advance of the filing of a complaint. To interpret that section as authorizing the resolution of factual controversies without a jury trial would pose grave constitutional questions. As stated of the summary judgment procedure, it "was not intended to [and] *cannot* deprive a litigant of, *or*

at all encroach upon, his right to a jury trial." (Emphasis added.)

> *Whitaker v. Coleman* (5 Cir., 1940) 115 F. 2d 305, at 306.

The power conferred by Section 501(b) to refuse to permit an action to be commenced serves the same purpose as summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Both are intended to eliminate, without the expense of trial, cases which involve no genuine dispute of fact. The hearing provided by Section 501(b) is "a preliminary requirement . . . intended as a safeguard . . . against harassing and vexatious litigation brought without merit or good faith." *Highway Truck Drivers and Helpers Local 107 v. Cohen* (E.D. Pa., 1960) 182 F. Supp. 608, at 622, fn. 10. Summary judgment procedure is similarly intended "to provide against the vexation and delay which necessarily come from the formal trial of cases in which there is no substantial issue of fact." *Zampos v. United States Smelting, Refining & Min. Co.* (Cir. 10, 1953) 206 F. 2d 171, at 173. See also, *Associated Press v. United States* (1944) 326 U.S. 1, 6, 65 S.Ct. 1416, 89 L. Ed. 2013; *Krieger v. Ownership Corporation* (Cir. 3, 1959) 270 F. 2d 265, at 270.

It is clear, of course, that the summary judgment procedure does not authorize a trial on affidavits of disputed factual issues. As stated in *Associated Press v. United States* (1944) 326 U.S. 1, at 6, 65 S. Ct. 1416, 89 L.Ed. 2013:

> . . . Rule 56 [authorizing summary judgment] should be cautiously invoked to the end that

> parties may *always be afforded a trial where there is a bona fide dispute of facts* between them. (Emphasis added.)

As stated by this Court in *Cox v. American Fidelity & Casualty Co.* (Cir. 9, 1957) 249 F. 2d 616, at 618:

> When confronted with a motion for summary judgment, the trial judge must determine if there are any material factual issues that should be resolved before the trier of fact. *It is not the trial judge's function . . . to resolve those issues or to weigh the evidence.*
>
> * * * * *
>
> "A litigant has a *right* to a trial where there is the *slightest doubt* as to the facts . . ." (Emphasis added.)

On appeal, the standard of review applied to an adverse decision under Section 501(b) should be the same standard which is applied to an order granting summary judgment. That standard is well-established: "In reviewing the summary judgment, we need consider only that evidence most favorable to the party *against* whom the judgment was rendered, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence." (Emphasis added.) *Pogue v. Great Atlantic & Pacific Tea Company* (Cir. 5, 1957) 242 F. 2d 575, at 576.

While we have urged that the standard of review applicable to the instant case should be *"at least"* as stringent as that applied in reviewing summary judgments, there is good reason for applying a far *stricter* standard to the denial under Section 501(b) of leave

to file a complaint. As discussed in our opening brief, "good cause" under Section 501(b) is merely a "preliminary requirement" to dispose of suits "brought without merit or good faith". *Highway Truck Drivers and Helpers Local 107 v. Cohen* (E.D. Pa., 1960) 182 F. Supp. 608, at 622, fn. 10; *aff'd* 284 F. 2d 162; *cert. den.,* 365 U.S. 833. Such requirement must be met before a complaint has been filed and before discovery rights have become available to the plaintiffs. The litigation is then in an embryonic stage, the plaintiffs having had no opportunity to discover the nature of the defenses which will be asserted or the evidence which the defendants will offer. The showing of good cause required at this stage of the suit—in advance of filing a complaint—should be considerably less than the showing required to defeat a motion for summary judgment.

Appellees, on the other hand, would grant the trial court "discretion" to resolve evidentiary conflicts and choose among conflicting inferences, as if the summary hearing before him were a trial on the merits. (Appellees' Brief, "General Rules Governing This Appeal," p. 8-11.) Appellees would correspondingly restrict this Court's review to an application of the substantial evidence rule, although that is a form of appellate review which assumes a trial on the merits. Appellees have wholly failed to recognize that appellants have been *denied* a trial, and that that denial is precisely what this appeal seeks to correct.

B. THE RETROACTIVITY OF THE LMRDA IS IRRELEVANT TO THE PRESENT ACTION.

Appellees contend that the cause of action stated in appellants' complaint arose prior to the effective date of the Act. (Appellees' Brief, 12-13.) Appellees rely on authorities holding that, because Section 501 of the LMRDA is not retroactive, that section does not apply to any breach of trust by a union official which occurred before September 14, 1959, the effective date of the LMRDA. See *Holton v. McFarland* (D. Alaska, 1963) 215 F. Supp. 372, 376; *Highway Truck Drivers and Helpers Local 107 v. Cohen* (E.D. Pa., 1960) 182 F. Supp. 608, 611. This contention was not suggested to the lower court, although the same argument had been advanced by appellees in the Local 97 action and rejected by the court in that action.

The crux of appellees' argument is that the complaint constitutes "an attempt *to attack a plan* which was in existence prior to the time the LMRDA became effective." (Emphasis added.) (Appellees' Brief, 12). Based upon this characterization of the complaint, appellees contend that its cause of action arose before the effective date of the LMRDA.

On the contrary, the complaint is plainly not "an attempt to attack a plan"; its purpose is to recover District funds improperly expended by District officials for their personal benefit. Appellants' cause of action is based upon the unauthorized *payment of union funds* by appellees into the Severance Plan, in violation of appellees' fiduciary duty to their union. The charging allegations of the complaint are quite specific:

> Commencing on or about April 15, 1962, . . . defendant officials have caused funds of said District . . . to be *paid* to defendant Bank, to be held by it under the purported Severance Plan. . . . Said *payments* were and are without any valid authorization. By *causing said funds to be paid* the defendant officials have violated their fiduciary obligations to the District. . . . (Emphasis added.) (C. 67:19-25).

Appellees' improper and unauthorized misapplication of District funds has occurred each and every time appellees have paid District funds into the Severance Plan. A trustee who misuses the funds entrusted to him according to a regular and systematic plan (such as making unauthorized monthly payments of trust funds into a personal retirement plan) breaches his trust with each and every payment. It is the payment, not the plan, which violates his fiduciary obligation. It is undisputed that the payments herein commenced "on or about April 15, 1962" (C. 67:19-20); such was more than two and one-half years *after* the LMRDA became effective.

Finally, it should be noted that the District was not created until April 1, 1962. (C. 77:18-21.) It would be indeed strange if a cause of action for the misuse of District funds could arise in 1959, over two years before District came into existence.

C. THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE NOT APPLICABLE.

Appellees next argue that an order of the court in the Local 97 action barred the instant suit under principles of res judicata. (Appellees' Brief, 13-20.) On December 16, 1963, plaintiffs in the Local 97 action moved therein for leave to file an amended complaint alleging, *inter alia,* substantially the same violations of trust respecting misapplication of District funds as are alleged in the instant action. Said amendment would have brought District, the National Union and several District officials into the Local 97 action as defendants (I R. 3:1-5.) This motion to amend was denied. (C. 64-9.) The order so denying the motion, appellees contend, was a final "adjudication on the merits that the plaintiffs were not entitled to any relief against District" (Appellees' Brief, 15); they urge it therefore barred the instant action.

Appellees are wrong. The order denying amendment was based not on the merits but on procedural grounds unrelated to the merits, such being the only objections raised to it by District. (I R. 15:15-23.) Moreover, that order was an interlocutory, non-appealable order, not a final judgment. Our position is set forth below.

1. The Denial of a Motion to Amend the Complaint in the Local 97 Action was Not an Adverse Ruling on the Merits of the Proposed Amended Complaint.

The objections raised by District to the motion to amend the complaint were based upon procedural grounds, wholly collateral to the merits of the proposed amended complaint (I R. 15:15-23; 10:4-11:23).

The argument in opposition to the amendment was based primarily on two procedural grounds, the alleged failure of plaintiffs to request District to take action as required by Section 501(b) and their alleged failure to exhaust administrative remedies. The brief filed by District stated:

> (1) *No request or demand for court action or any other action has in fact been made* upon this proposed defendant or its governing board or its officers by plaintiffs, or any of them, in connection with the subject matter of said proposed First Amended Complaint;
>
> (2) *Plaintiffs' remedies within this proposed defendant union have not been exhausted* in connection with the same subject matter; and (Emphasis added.)

The motion to amend was denied without comment. (I R. 4:14-17.) That denial cannot be regarded, for res judicata purposes, as a ruling on the merits. As stated in *Scrofani v. Miami Rare Bird Farm* (Cir. 5, 1953) 208 F.2d 461, at 464:

> . . . We think that the rule enunciated in West Coast Life Ins. Co. v. Merced Irr. Dist., 9 Cir., 114 F.2d 654, 661, certiorari denied 311 U.S. 718, 61 S.Ct. 441, 85 L.Ed. 467, is applicable to the facts of our case and effectively disposes of appellee's argument. The court in that case said: "Where a number of grounds for dismissal of an action are urged, an order of a court simply that the cause be dismissed, without an indication as to the ground upon which the court acted, cannot be res judicata of all possible grounds for such order."

It is clear that a judgment of dismissal based on a failure to exhaust administrative remedies is not res judicata on the merits. In *Bland v. Connally* (Cir. D.C., 1961) 293 F.2d 852, at 855, it was held that a judgment of dismissal grounded on the plaintiff's failure to exhaust administrative remedies prior to bringing suit was not a bar to the commencement of a subsequent suit on the same cause of action, following the exhaustion of such administrative remedies.

As stated in the Restatement of Judgments, §54:

> Where a judgment is rendered for the defendant on the ground of the non-existence of some fact essential to the plaintiff's cause of action, the plaintiff is not precluded from maintaining an action after such fact has subsequently come into existence.

This Court similarly held, in *Southern Surety Co. v. Sheldon* (Cir. 9, 1929) 33 F.2d 289, at 290, that the appropriate disposition of an action prematurely brought is dismissal *without* prejudice; and this Court expressly rejected the contention that dismissal of a premature action should be with prejudice so as to bar a subsequent suit on the same cause of action. To the same effect, see *Sawyer v. Pioneer Mill Company* (Cir. 9, 1962) 300 F.2d 200, at 202 (dismissal for failure to join necessary party).

In short, the principle of res judicata would be inapplicable here (even if the ruling involved were a final judgment) because "The authorities are uniform to the effect that a question cannot be res judicata in view of a prior decision unless the issue

therein was determined on its merits." *In Re Hoover Co.* (CCPA, 1943) 134 F.2d 624, at 628.

2. An Order Denying Leave to Amend a Pleading is Not a "Final Judgment."

In *National Machinery Company v. Waterbury Farrel Foundry and Machine Company* (Cir. 2, 1961) 290 F.2d 527, 528, an order refusing to permit an amended answer asserting permissive counterclaims was held non-appealable, with the following comment:

> By refusing to permit the defendant to assert the claims in this suit, the court did not decide or reflect upon the merits. It merely forced the defendant to institute new proceedings in the same or in another forum where the plaintiff could be served. Cf. Thompson v. Broadfoot, 2 Cir., 1948, 165 F.2d 744 [denial of motion for permissive intervention held non-appealable].

See also, *Hancock Oil Co. v. Universal Oil Products Co.* (Cir. 9, 1941) 120 F.2d 959, at 960 ("The order denying leave to file the amendment to the answer obviously was not a final order so as to be appealable"); *Balboa Shipping Co. v. Standard Fruit & Steamship Co.* (Cir. 2, 1950) 181 F.2d 109, at 110 (Order denying proposed amendment to libel against United States alleging facts to include another public vessel of United States held not a final order).

With respect to an analogous ruling respecting the exclusion of parties, the Supreme Court has held that denial of a motion to intervene is not an appealable order:

> Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave

> to intervene where intervention is a permissive matter within the discretion of the court. United States v. California Co-op. Canneries, 279 US 553, 556, 73 L ed 838, 841, 49 S Ct 423. *The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case.* He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability. (Emphasis added.) *Railroad Trainmen v. Baltimore & O.R. Co.* (1946) 331 U.S. 519 at 524, 91 L. Ed. 1646, 67 S.Ct. 1387.

An order denying an application to add new defendants is "permissive" in the sense that it is addressed to the discretion of the court. Rule 21 of the Federal Rules of Civil Procedure grants broad discretion to the trial court in ruling on such applications:

> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.

Finally, not one of the cases cited by appellees to support their contention that the denial of leave to amend was "a final, appealable order" (Appellees' Brief, 15) involves either a motion to amend or a motion to bring in additional parties. *Mercantile National Bank v. Langdeau* (1963) 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520, involves the appealability

of a venue order; *Hudson Distributors v. Lilly & Co.* (1964) 377 U.S. 386, 389 fn. 4, 84 S.Ct. 1273, 1276 fn. 4, 12 L. Ed. 2d 394, 397 fn. 4, states that the mere presence of unresolved issues in the state courts does not make a decision of the highest state court non-final and non-appealable. *Chapman v. Sheridan-Wyoming Coal Company* (1950) 338 U.S. 621, 70 S.Ct. 392, 94 L.Ed 393, involves no apparent issue as to appealability or finality of an interlocutory order.

D. ALL ISSUES OF FACT SHOULD HAVE BEEN RESOLVED IN FAVOR OF APPELLANTS.

1. Scope of Apellate Review of Factual Issues.

Appellees claim that four disputed factual issues were presented to the lower court: (1) Whether appellant Horner was a member in good standing of District; (2) whether Local 97 authorized the Severance Plan at the outset; (3) whether payments into the Severance Plan were ratified by District; and (4) whether appellants exhausted their internal union remedies. The lower court, appellees argue, *could* have accepted appellees' evidence on one or more of these issues in ruling as it did; and, under appellees' version of the standard of appellate review herein, "if there is anything in the record to sustain the exercise of discretion by the District Court, the order appealed from must be sustained." (Appellees' Brief, 20.)

Appellants contend, on the contrary, that the District Court had no power to resolve disputed issues of fact in connection with the motion before it, but that,

as in the case of a motion for summary judgment, the parties should "always be afforded a trial where there is a bona fide dispute of facts between them." *Associated Press v. United States* (1944) 326 U.S. 1, at 6, 65 S.Ct. 1416, 89 L. Ed. 2013. Hence, as in the case of a summary judgment, appellate review should "consider only that evidence most favorable to [appellants], giving [appellants] the benefit of all favorable inferences that may be drawn from the evidence." *Pogue v. Great Atlantic & Pacific Tea Company* (Cir. 5, 1957) 242 F.2d 575, at 576.

The following discussion assumes that this Court will review all issues of fact presented below as if this were an appeal from an order granting summary judgment.

2. Union Status of Appellant Horner.

Appellees contend that appellant Horner's union membership had lapsed (Appellees' Brief, 23-24) because, they claim, Mr. Horner failed to make payments in respect of a dues increase which had become effective just 15 days before the hearing in the lower court. (II R. 6:3-7.) Appellees contend, apparently, that the referendum vote authorizing this increase applied to pensioners, such as Mr. Horner, as well as to active members; and that Mr. Horner's failure to pay additional dues within the 15-day period caused the automatic loss of both his union membership and his standing to participate in this action.

Appellants' evidence, however, showed that Mr. Horner had paid his full yearly District dues in ad-

vance—prior to the increase—for the entire calendar year 1965. (II R. 5:24-25.) The receipt for those dues, duly executed on behalf of the District, was introduced in evidence. (II R. 21:19-22:9.) As of April 15, 1965, the hearing date, Horner's dues were *over*paid, even if the increase were applicable to him. (II R. 6:23-7:9.)

Appellants adduced further evidence that the dues increase did not apply to Horner because he was retired; the increase applied only to active union members (II R. 6:15-7:23). It was undisputed that District had not notified its retired members that the increase applied to them (II R. 6-7).

It was undisputed that at least five of the six plaintiffs are members in good standing of District.

The point was thin at best; in the face of conflicting evidence it can hardly be relied upon to support the lower court's ruling. The evident function of appellees' argument is to renew several collateral contentions which they frequently asserted below: That because appellants are "dissidents," (I R. 20, 22) and because certain appellants have a retired or inactive status, their claims are less worthy of trial. Quite apart from their immateriality, these contentions imply a grossly misleading picture of the affairs and internal relationships of the Marine Engineers' union and of appellants' role in that union.

As for the assertion that appellants are "dissident union members" we can only say that they are of course dissident. It is dissidence, not harmony, that makes lawsuits. It was, of course, to protect "dissident

union members" that Congress enacted the LMRDA, based on a legislative determination that the grievances of such members were frequently meritorious and deserving of trial.

Appellees' other collateral point, that because certain appellants have retired from the sea, they can have no further legitimate interest in the affairs of their union (Appellees' Brief, 24) is utter nonsense. This is a union of seagoing engineers; and engineers at sea cannot go to union meetings. There is consequently "minimal continuity of attendance at meetings" on the part of the active members of District. (C. 114:11-23.) For this reason, the active seagoing members of the union are those *least* able to supervise the activities of union officials.

Only retired or inactive members, with an interest in their union, can follow the affairs of such a union from one meeting to the next. The interest of appellants in their union derives, quite naturally, from a long and devoted participation in union affairs. As stated by Mr. Horner:

> I have been continuously a member of one or another of the local branches or subordinate associations of the National Marine Engineers for the past 40 years. . . . I have participated actively in the affairs of Local 97 for many years, having held elective office, and having served on various committees. I am 72 years of age; I stopped going to sea in July, 1954 and I have attended most of the meetings of Local 97 since then. (C. 23:26-32.)

Thus the retired or inactive member of *this* union is likely to be the *only* member who observes that repre-

sentations made by officials in 1956 are proven false by facts disclosed in 1961. The mere fact that he is retired does not make him the less outraged at flagrant misconduct by the officials of his union.

3. The Severance Plan was Not Properly Adopted.

Appellees next argue that there was evidence that *Local 97* authorized the participation of *its* officials in the Severance Plan; appellees contend that such evidence would support a decision that District did likewise. (Appellees' Brief, 24-28.) The only evidence which appellees cite is Resolution No. 327, which states that, "Whereas a pension program has been established for [the rank and file] * * * an independent and separate retirement plan shall be established for the full time Union Officials." (C. 29.) Appellees argue that the District Court could have concluded, from "modern common experience" (Appellees' Brief, 25) that "retirement plan" as used in Resolution No. 327 is a term sufficiently broad as to encompass severance benefits. Appellees not only failed to adduce evidence below as to what "retirement plan" was intended to mean in connection with the specific resolution at issue; appellees did not even present to the lower court any evidence of "modern common experience."

In fact, the evidence which *was* offered below on this issue amply demonstrated that Resolution No. 327 did *not* authorize a Severance Plan. On its face, Resolution No. 327 says nothing about severance benefits; it merely expresses an intent to establish a retirement program for union officials comparable to that available to the rank and file, but "independent and

separate from the Pension Plan to which shipping companies contribute." (C. 29.) Appellants' evidence showed that the membership of Local 97 believed that Resolution No. 327 authorized an officials' plan substantially identical to that available to the rank and file (C. 24:21-28).

Appellees nevertheless contend that "modern common experience" (Appellees' Brief, 25)—no evidence of which was adduced below—should override the specific intent of the Local 97 membership at the time of passing Resolution No. 327. The "modern common experience" to which appellees allude is that of sophisticated lawyers, as reflected in a Prentice-Hall looseleaf service. (Appellees' Brief, 25-28.) Such experience is unlikely to be that of marine engineers; and it is highly improbable that the membership of Local 97, having recently obtained a "retirement program" *not* including severance benefits, would construe "retirement program" as used in Resolution No. 327, as one which *would* include severance benefits.

Again, a triable issue of fact, at the very least, was presented; and it should have been tried.

It should be further noted that the issue in *this* case was whether *District* ever authorized *its* officials to pay *District* funds into the Severance Plan, not whether Local 97 officials were guilty of misconduct. The propriety of paying District funds into the plan should be determined on the basis of the authority or lack of it secured by appellees from District; and Resolution No. 327 was a resolution of Local 97, not of District.

4. Ratification Presented a Triable Issue of Fact.

Appellees' contention below that several votes taken within District amounted to a "ratification" of the Severance Plan (C. 103-104) was challenged on two distinct factual grounds. First, appellants demonstrated, by uncontradicted evidence, that appellees had not made the full disclosure which is essential to the effective ratification of a breach of trust. (113-119.) Second, appellants' evidence showed that the votes—none of which was by its terms a direct ratification or endorsement of the Severance Plan—were not intended by the membership to imply approval of the Plan itself. (C. 113:15-21.) The lengthy argument in Appellees' Brief (28-37) fails to come to grips with either of these factual issues.

(a) Appellees failed to make full disclosure.

Appellees' position respecting disclosure is quite simple: they contend that their duty of disclosure was discharged by *appellant Horner*. (Appellees' Brief, 36-37.) Thus appellees assert that "Horner has not been impeded from asserting his views" and that the members voted "with Horner's version of the facts before them" (Appellees' Brief, 36). This argument has a fundamental defect: it is appellees, not appellants, who carried the fiduciary duty of full and honest disclosure. The uncontradicted evidence adduced below as to the representations of *appellees*—that is, what *they* said to the membership respecting the plan—was as follows:

> No defendant has ever made a full and honest disclosure to the membership of the invalid

> nature of the Severance Plan or of the basis for plaintiffs' objection to it. On the contrary, *defendants have consistently represented to the membership that the Plan was properly authorized;* said representation has been false; and *it has been that representation which has induced the membership to vote as they have.* (Emphasis added.) (C. 114).

The minutes of the Wilmington Branch Meeting state that, following Horner's presentation, appellee Ferron "took issue" with Horner's statements. (C. 80, Ex. E.)

The positions of the parties may be demonstrated by this example: T, a trustee responsible for managing trust funds for beneficiaries A, B, C and D, is charged by beneficiary A with misapplication of funds. In response, T calls a meeting of all beneficiaries, at which he permits A to state his claims. T then informs the beneficiaries—falsely—that his actions were duly authorized by the provisions of the trust indenture, an elaborate and abstruse document which no beneficiary, except A, has ever read. A is permitted to rebut by denying that the indenture says what T has represented; A is, in short, "not impeded from asserting his views." T closes with several derogatory comments on A's age, experience and mental capacity; and beneficiaries B, C and D vote to approve T's actions (after all, T is their trustee; A is, as T says, a "dissident"). Is the ratification effective? Appellees would say yes; appellants vigorously urge that it is not.

Appellants' evidence that appellees have "consistently represented to the membership that the Plan was properly authorized . . . and that it has been that representation which has induced the membership to vote as they have." (C. 114:17-19), plainly gave rise to a triable issue of fact on the question of disclosure.

(b) The votes were not "implied" ratifications.

Furthermore, none of the votes relied on by appellees was a vote to ratify the Plan. (C. 80 and Exhibits.) They were, in the main, votes that the union *not sue its officials* for violation of Section 501. A decision not to sue is obviously not synonymous with a determination that no cause of action exists. Appellees offered no evidence to show that these votes should be construed as implying approval of the Severance Plan. Appellants, however, adduced evidence that the votes did *not* imply such a ratification. (C. 113.)

Whether the votes implied a ratification of the Plan itself or merely an unwillingness to bring suit was, at the very least, a further question of fact which should have been tried.

5. Exhaustion of Internal Union Remedies.

Appellees correctly state that appellants devoted "a good portion of their Opening Brief" to the subject of exhaustion. (See Appellants' Opening Brief, 23-33.) We did so because we believe the lower court based its ruling on an incorrect view that suits under Section 501(b) are subject to an exhaustion require-

ment, in apparent reliance on *Penuelas v. Moreno* (S.C. Cal., 1961) 198 F.Supp. 441. We sought to demonstrate in our opening brief that the *Penuelas* decision is wrong and has been generally repudiated.

Appellees contend that even if *Penuelas* is wrong, exhaustion "is still a factor which may be considered in the exercise of discretion by the District Court on whether good cause [under Section 501] exists." (Appellees' Brief, 37.) The contention is wholly unsupported by the authority cited for it. The case which appellees cite, *Edsberg v. Local Union No. 12 of Int. U. of Operating Eng.* (9th Cir., 1962) 300 F.2d 785, 787, 788, did not purport to construe section 501; the excerpt from *Edsberg* quoted by appellees deals with Section *101* of the LMRDA, not Section 501. Suits under Section 101 are made subject to an exhaustion requirement by the specific terms of the Act.

Next appellees argue that a referendum could have been secured by appellants. Thus they state:

> . . . while appellants claim that calling a referendum is discretionary with the District Executive Committee, appellant Horner's own testimony indicates the simple procedure utilized by a member to obtain a referendum on another issue.
>
> Appellees' Brief, 38-39.

The fact that the District Executive Committee may on one occasion have acceded to a member's request for a referendum (to increase dues) (II R. 10:22-11:16) does not in any sense demonstrate that *appellants* could have secured a referendum merely by asking for it. It is undisputed that the District by-laws,

Article VI, Section 5(1) confer on the *District Executive Committee* the exclusive right to grant—or deny—referendum votes. That Committee is, of course, comprised largely of appellees themselves. (C. 115:8-14.) Appellants have formally requested that the Committee take appropriate action to secure the return of the Severance Plan contributions. (C. 68:17-19.) Appellees—the Executive Committee—have done nothing. (I R. 44:4-14.)

E. STATUTE OF LIMITATIONS.

Appellees' argument that the lower court's order may be sustained on grounds of the statute of limitations (Appellees' Brief, 39-41) is extremely farfetched.

First, the limitations period applicable to suits for breach of fiduciary obligations is four years under California law, not three years as stated by Appellees. California's "catch-all" statute of limitations, California Code of Civil Procedure, Section 343—a four-year statute—controls suits "to enforce trusts" and "to enforce the trustee obligations of other fiduciaries." 1 Witkin, *California Law,* 660.

A suit under Section 501 is a suit to enforce a fiduciary obligation. Section 501(a) states that "the officers . . . of a labor organization occupy *positions of trust* in relation to such organizations. . . ." It has been repeatedly stated that Section 501 imposes federally enforceable *fiduciary obligations* on union officials.

> The principles stated in Section 501(a) were drawn from the Restatement of Agency in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees with such adaptations as might be required to take into account "the special problems and functions of a labor organization." * * * Cox, Internal Affairs of Labor Unions Under the Landrum-Griffin Act, 58 Mich. L. Rev. 819, 828 (1960).

See,

Nelson v. Johnson (1963) 212 F. Supp. 233, at 240.

Second, each unauthorized payment made by appellees created a new and distinct cause of action with a new limitations period. As argued at length above, in connection with the non-retroactive nature of the Act, it is unauthorized *payments* at which this action is directed; the bare execution of the Severance Plan by Local 97 officials would hardly provide grounds for this suit, despite the lack of authority therefor, had appellees not proceeded to pay *District funds* into that plan.

Third, appellees at no time asserted the statute of limitations in the lower court. While they did move to dismiss the Local 97 action on grounds, *inter alia,* of the statute of limitations (the motion was denied), they did not make a like claim in the instant case.

Finally, the complaint seeks recovery for *District of District* funds misappropriated by *District* officers. District was not created until April 1, 1962; appel-

ants' application to file this complaint was made on March 31, 1965, or within three years of the creation of District. Appellants' cause of action could hardly have accrued, as appellees claim, in July, 1961, nearly a year before District came into being.

F. RULE 23(b).

It seems obvious that the substantial body of rules respecting exhaustion of internal union remedies—and not Rule 23(b)—controls the pleading requirements in suits brought on behalf of a union under section 501 of the LMRDA. The point is fully discussed in our opening brief, pages 35-37.

III. CONCLUSION.

This action has substantial merit and it should be tried. The Local 97 action, involving the unauthorized diversion of Local 97 funds into the identical severance plan, is now at issue; it has withstood the defendants' motion to set aside the good cause order and their further motion to dismiss; it will be tried. Why the lower court came to a different conclusion in the present case is wholly obscure. At oral argument, the court itself stated that "I think the case inevitably has to be tried," (I R. 24:17-18) and succinctly articulated the reasons for a trial on the merits:

> . . . it's a type of a case that inevitably has to be aired in court and subjected to the cross-examination and the usual formalities that we engage in

> in the determination of factual issues, and I would be reluctant to pass upon a motion for summary judgment envisioning or attempting to envision, at least, the issues as I see them tendered to the Court. I think it would be most insecure in the Court of Appeals. They might make very short work of it, and what would it profit us to go up to the Court of Appeals and come back and have to retry it? I think it would be far better to try the case and get it over with. Somebody is right and somebody is wrong. (I R. 25:11-23.)

We submit that the lower court's comments were quite appropriate; this is indeed a case "that inevitably has to be aired in court and subjected to the cross-examination and the usual formalities that we engage in in the determination of factual issues. . . ."

We respectfully submit that the order of the lower court should be reversed.

Dated, Oakland, California,
March 2, 1966.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellants.